Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	
Spectrum Aggregation Limits	)	WT Docket No. 98-205
for Wireless Telecommunications Carriers	)	
	)	
Cellular Telecommunications Industry	)	
Association's Petition for	)	
Forbearance From the 45 MHz	)	
CMRS Spectrum Cap	)	
	)	
Amendments of Parts 20 and 24 of	)	WT Docket No. 96-59
the Commission's Rules - Broadband PCS	)	
Competitive Bidding and the Commercial	)	
Mobile Radio Service Spectrum Cap	)	
	)	
Implementation of Sections 3(n) and	)	GN Docket No. 93-252
332 of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

COMMENTS OF SBC WIRELESS INC.

Carol L. Tacker
Vice President & General Counsel
17330 Preston Road, Suite 100A
Dallas, TX 75252
Phone: (972) 733-2005
Fax: (972) 733-2021

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COMMENTS OF SBC WIRELESS INC.

Comes now SBC Wireless Inc. ("SBCW")[1] on behalf of itself, its subsidiaries and affiliates, files these Comments in response to the Notice of Proposed Rulemaking ("NPRM") in the docket referenced above.

I. Introduction

SBCW, through its affiliates, subsidiaries, and partnerships is a license holder of both PCS (Part 24) and Cellular (Part 22) licenses in over 100 markets, nationwide. Therefore,

SBCW has a vested interest in the Commission's ultimate decision regarding whether it should forbear from enforcing or eliminate the 45 MHz spectrum cap currently imposed on wireless carriers.

II. Summary

The spectrum cap ("cap") was imposed early in the history of the wireless industry to ensure no one carrier could completely control a single market, thus impeding the development of competition. What may have been a defensible goal in the dawn of commercial wireless service has been surpassed by the development of an unprecedented competitive playing field that exists in the wireless market place today.

Today's markets may have from three to seven viable service providers offering various wireless alternatives to both niche and general customers. With the growth of the wireless industry far exceeding every early prediction, many of the original operators of cellular systems are now experiencing limitations on network capacity caused by increased subscriber base and usage. As consumers demand new and increasingly sophisticated wireless options, the carrier is forced to find innovative methods of stretching its allocated wireless spectrum, that is already fully utilized, in order to include these innovations and thus remain competitive.

Ironically, as the industry matures, the goal of the Commission to ensure competition by limiting the allocation of spectrum has evolved into a barrier to the promotion of innovation and features competition due to the near exhaustion of network capacity in many markets. This result can and should be forestalled through the elimination of the spectrum cap and of the

[1] SBCW files on behalf of itself and its subsidiaries Southwestern Bell Wireless Inc., Southwestern Bell Mobile Systems, Inc., Pacific Bell Wireless ("PBW"), and SNET Mobility, and the affiliates and partnerships of each,

cellular cross interest rules. Sufficient safeguards exist in the current framework of laws and regulations so that the fully competitive wireless market place will continue unimpeded by artificial and outdated restrictions.

III. Telecommunications Act of 1996 ("Act")

Section 11 of the Act charges the Commission with reviewing its regulations on a biennial basis to determine whether the regulation is in the public interest or is no longer necessary due to meaningful economic competition among service providers.[2] Should the Commission determine that a specific three-pronged test is met,[3] then Congress has granted the Commission the flexibility to forbear as to the affected regulations.[4] Similar authority exists for the Commission to terminate regulations that are no longer meaningful in a competitive market place.[5]

SBCW will show that not only is there sufficient support in the market place to mandate forbearance as requested by the CTIA in its petition,[6] followed by a "sunset" of the regulation, but the preferable solution to ensure certainty to investors and entrepreneurs is to eliminate the cap altogether. Elimination of the cap is the most appropriate method of setting aside an outdated regulation and encourages long term investment and innovation. Finally, the cellular cross interest rules are outdated and should be repealed, otherwise termination of the cap is an incomplete solution.[7]

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collectively referred to as "SBCW."
[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (1996 Act)
[3] Infra, at pp. 12.
[4] 47 USC § 160.
[5] Telecommunications Act, § 308 (b), 310 (d)
[6] Petition for Forbearance of the Cellular Telecommunications Industry Association, September 30, 1998.
[7] 47 CFR § 22.942 et seq.

IV. Argument

SBCW has experience that enables it to provide insight regarding the competitive wireless market place from two opposed, but equally valid, viewpoints. First, SBCW, through its affiliates and affiliate partnerships, is one of two cellular (A and B band) providers in four of the top ten cellular MSAs, as well as in numerous smaller MSAs and RSAs. SBCW operates systems that were among the first to offer commercial service in the United States.[8]

At the opposite end of the operation timeline, SBCW entered the highly competitive wireless arena in California and Nevada as a third or even lower tier competitor through Pacific Bell's PCS licenses.[9] Since beginning operation as a PCS provider in California and Nevada, SBCW has added over 800,000 customers and has erected in excess of 2,000 cell sites in that region, evidence of the fiercely competitive environment in which wireless carriers currently operate. Competition has had the effect of dramatically lowering the price of handsets and services over time, and is a factor in the development of innovative features that enhance the utility of wireless technology for the consumer.[10] With the wireless market place having emerged as fully competitive, rules and regulations aimed at encouraging the development of competition are no longer valid. Even more problematical is the fact that rules limiting spectrum have the negative impact of preventing established competitors from acquiring spectrum that could be used to relieve network exhaustion and promote the introduction of additional and innovative features. Thus, not only do the current regulations protect a phantom, but the rules have also become an impediment to innovation.

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[8] Chicago (Mkt 3A1) initiated service in 1983; Dallas (Mkt 9B1) initiated service on July 31, 1984.
[9] PBW initiated service in San Diego in 1996 and in Los Angeles and San Francisco in 1997.

A. Relevant Market Definitions

The Commission has inquired what is the relevant product market in which to examine the potential effects of eliminating the cap?[11] In order to determine an appropriate market definition for this purpose, the Commission should include those services that are competitive with, or are readily substitutable for, traditional wireless service. This evaluation must include niche as well as general market competitors, for many of the niches being solicited by specialized providers are among the more lucrative business customers in a given market. Thus, the most likely definition of what products should be included in a relevant market for consideration of elimination of the cap, are those services set out by the Commission in 47 CFR § 20.9 wherein the rule defines various commercial radio services.[12] These services compete for all, or some portion of, the same pool of customers.

The Commission then asks, what is the relevant geographic market?[13] There is no meaningful overlap in how service areas are drawn, in accordance with Commission rules.[14] For purposes of this analysis, the Commission should not artificially restrict the included geographic market. An artificial restriction is doubly invalid given the fact many wireless providers are extolling the virtues of "nationwide seamless service" as a fundamental thrust of their product marketing.[15] These carriers are not licensed in every market, nationwide, but have constructed the illusion of a national footprint through the combination of licensed areas

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[10] See Third Annual CMRS Competition Report at 2-4.
[11] Notice of Proposed Rulemaking, at p. 19, para. 35.
[12] See 47 CFR § 20.9 (a) (1) - (13).
[13] Notice of Proposed Rulemaking, at p. 19, para. 35.
[14] A PCS MTA may, and often does, include multiple cellular MSA and RSA market boundaries. The same is true of the BTA licenses issued by the Commission.
[15] See e.g. Sprint PCS' claims of nationwide service, and the AT&T One Rate.

and favorable roaming agreements. This national market place virtually ignores the more narrow limitations of a designated service area. Thus, the geographic market in which the elimination of the cap should be analyzed should not be limited to a particular service area definition.

The Commission has also inquired, what is the relevant measure of market capacity?[16] The most logical measure of market capacity for purposes of analyzing the elimination of the cap is to examine the spectrum assigned to the various carriers. To measure more contingent barometers such as subscribers or minutes of use could result in a snapshot analysis that has no relationship to the ultimate depiction of a market. For instance, a given PCS carrier may have only 2% of the wireless customers in a given market due to the fact it is a new entrant, but through aggressive marketing, that number could climb to 20% or even higher within a very short period of time. But whether this carrier has 2% or 20% or more of the customers in an area, it always retains a 30 MHz block of spectrum under its control and that spectrum is unavailable to other users.[17]

Likewise, a newer carrier with an increasing customer count may not face the same network capacity issues as a longtime licensee with an entrenched customer base. Because customer numbers and usage is a fluid and unspecific measure, for the analysis to be valid, the most likely measurement should be allocated spectrum.

[16] Notice of Proposed Rulemaking, at p. 19, para. 35.
[17] 10 MHz for BTAs.

B. Market-by-market Analysis

The issues raised in the NPRM concerning the level of competition in "smaller" or "rural" markets are illusory.[18] The Commission questioned that some "small" markets have no new entrants other than "uncommitted" entrants, therefore should the analysis include only current suppliers or those with an immediate intent to serve?[19] Likewise, should the cap be applied on a market-by-market basis due to these concerns?[20]

The logical response to both of these questions is "no." First, due to the way in which the MTAs are drawn, what may be a rural cellular market ("RSA") could well be part of an urban MTA. Also, due to population density, what may be defined as a "rural" service area on the east coast is often equivalent to an MSA in a less densely populated area, so the distinction would be hazy and virtually unenforceable. This overlap would inevitably result in inconsistent application of a regulation for similarly situated service providers. Further, it is a generality to presume there is a lack of new entrance in all smaller or rural service areas. As cities expand their reach, and bedroom communities encroach on formerly non-urban areas, what may be rural one day could evolve into a suburb of a large city by the simple construction of a few housing tracts. Therefore, the Commission would be faced with continually reviewing its application of the cap to determine if a given community had changed its characteristics.

The cap is not an incentive to more vigorous competition in less densely populated areas. When there is less demand for service, there is less commercial interest, because the profit potential is reduced. This economic fact exists independently of the cap. Therefore, the

[18] Notice of Proposed Rulemaking, at p. 19, para. 36.
[19] Id.

Commission's analysis of the elimination of the cap in rural areas should focus on whether that elimination would impede competition, which it would not. The financial incentive to serve cannot be resolved by regulation, rather it is the competitive forces of the market place that will (or will not) provide those incentives.

The answer to the inquiry regarding whether the elimination of the cap impedes competition is no. The Commission has existing methods, independent of the cap, for examining whether a proposed consolidation of spectrum in a given rural market is in the public interest. Any transfer of control among wireless carriers must be approved by the Commission. Market forces may well determine if a carrier finds it commercially feasible to enter a given market, but no combination of existing carriers could result, absent Commission approval.

This existing responsibility to approve transfers of control alleviates the Commission's concern about spectrum consolidation through mergers and acquisitions.[21] The current rules require Commission approval of any non-affiliated transfer of control of a radio license. Id. Mergers or acquisitions with certain financial thresholds are further analyzed by the Department of Justice pursuant to the Hart-Scott-Rodino ("HSR") Act[22] to determine the potential for an anti-competitive effect. These same transfers must also be approved by the Commission before a change in control can be implemented.[23]

The general public is afforded the opportunity via Public Notice to comment on proposed changes in control. Thus, the elimination of the cap would not prevent the

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[20] Id.
[21] Notice of Proposed Rulemaking, at p. 20, para. 37.
[22] Hart-Scott-Rodino Antitrust Improvement Act, 15 USC § 18.
[23] 47 CFR § 22.137

Commission from analyzing relevant issues pursuant to its mandate under existing laws and regulations. Even a smaller scale transaction that does not meet the HSR thresholds must be reviewed by the Commission pursuant to these transfer of control rules. The Commission is charged, *inter alia*, with determining whether the transfer is in the public interest.[24]

Thus, the elimination of the cap would not deprive the appropriate governmental agencies from a timely and significant role in shaping the future wireless market place. Rather, it would permit a reasoned analysis based on a proposed transaction, instead of defaulting to an arbitrary limitation that may well prevent benefits to consumers.

C. Economies of Scope

In some instances, there are distinct advantages in favor of CMRS consolidation. For instance, the technical ability and financial backing to more rapidly introduce advanced technologies, and extend these technologies geographically, could result from consolidation. As the Commission correctly surmised,[25] there are many other economies of scope that could be realized if an incumbent carrier was given an opportunity to acquire additional spectrum currently denied by imposition of the cap. The ability to fully utilize invested capital in a given market would enable an established carrier to introduce sophisticated and high-demand features to a broad base of customers at low incremental cost. A critical impediment to the introduction of innovative services is the exhaustion of allocated spectrum in high usage markets where all available spectrum must be devoted to carrying core voice service. It is these same high usage markets that are most likely to have sophisticated customers who

[24] 47 CFR § 22.107 (b)
[25] Notice of Proposed Rulemaking, p. 21, 22, paras. 42-43.

demand additional features. Additionally, there is the risk that the limited availability of cell sites that can be readily acquired and constructed could result in fallow spectrum because some carriers cannot economically build-out a fully serviceable network.

SBCW has expended a large amount of capital to convert its principal cellular markets from analog to digital in order to stretch its allocated spectrum to the fullest extent. However, like most cellular carriers, SBCW has a broad base of analog customers it must continue to serve, so digital migration is a continuing process. The result is a network that is fully utilized in delivering quality voice traffic. The addition of features creates a further demand on a near-capacity network. As compared to the new PCS entrants to the market, cellular operators are faced with providing analog and digital voice services along with future wireless data services within a spectral bandwidth 5 MHz smaller than a PCS licensee operating in a MTA offering only digital voice service and potentially wireless data services. The ability to compete as newer services emerge demanding more bandwidth will become increasingly difficult. The ability to acquire additional spectrum could alleviate some of these network exhaustion issues and speed the delivery of advanced features while still supporting multiple operators.

D. New Technologies

SBCW agrees with the CTIA that the spectrum cap impedes the deployment of advanced technologies.[26] As stated, *supra*, the dedication of available spectrum in high usage markets to deliver mandatory voice service often does not leave sufficient unused spectrum to be utilized for advanced features and new technologies. If a service provider was free to acquire spectrum within its service area as that spectrum became available from the already

established spectrum pool, the likelihood of introducing innovation is increased and the need to allocate more spectrum could be delayed.

As for third-generation wireless services, should the Commission decide to dedicate a portion of the spectrum to these services, it is essential this use be excused from the cap, regardless of the outcome of this docket, in order to enable carriers to invest in these opportunities in a logical manner aimed at providing advanced services to existing customers. With few exceptions could those services be provided from existing cellular allotments.

E. Options to the Spectrum Cap

The 10% overlap limitation contained in the current cap restrictions is outdated.[27] The concerns that led to the creation of this limitation never materialized and are now rendered moot. PCS providers have emerged as a competitive force and are solidly entrenched with competitive networks and increasing customer counts.[28] SBCW argues that the more appropriate response would be to eliminate the cap. To apply differing limitations to rural areas or other discrete geographic areas could result in uneven and unequal regulation. Further, the development of a definition of "rural" would invite confusion, since the various service areas are quite different, and since a rural community can easily evolve into a suburban satellite of a large city over time.

Establishing different percentages and a "floating" spectrum cap will inevitably result in commercial uncertainty and disparate regulation.

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[26] CTIA Forbearance Petition at 22-27.
[27] 47 CFR § 20.6 (c)
[28] PBW provides PCS service in California and Nevada and currently serves over 800,000 customers utilizing approximately 2,050 cell sites

F. Forbearance vs. Elimination

SBCW agrees with CTIA that the three pronged test[29] necessary for the Commission to forbear enforcement has been satisfied.[30] SBCW refers the Commission to its previous discussion of how the wireless market place has evolved in order to support the CTIA's argument that the wireless market is fully competitive.[31]

Certainly, if the Commission chooses to forbear, it should also sunset the cap. A sunset provision would lend some certainty to forbearance. The suggestion of a market-by-market sunset date is unworkable and is inevitably going to result in regulatory disparity. The Commission could well find itself mired in multiple contentious disputes regarding whether a particular market should be escalated or delayed regarding applicability of the sunset provision.

A dual approach to approving mergers or transactions as proposed by the Commission[32] is unnecessary. As argued *supra*,[33] the Commission analysis of a proposed transfer would permit sufficient oversight concerning whether the transfer was in the public interest. The facts set forth by the Commission in this NPRM may well influence the decision the Commission ultimately makes regarding a transfer, but having separate approval tracks is inefficient and unnecessary.

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[29] The three pronged test is (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classification, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest. (Notice for Proposed Rulemaking, p. 31, para. 64; 47 USC § 332 (e) (1) (A))

[30] CTIA Forbearance Petition at 7-8.

[31] Supra.

[32] Notice of Proposed Rulemaking, at p. 33, para. 73.

[33] Supra.

The best evidence that elimination of the spectrum cap would not have a negative impact is the vigorous state of competition that exists in the wireless market place today, and the resultant effect on costs to consumers. For this competition to decrease, many well financed and successful service providers would have to suddenly exit the market place. There is no support for the argument that it is the existence of a spectrum cap that is keeping these competitors in the market. Consolidation could not occur absent review and approval by the Commission.

Again, the success of PBW in California and Nevada in signing almost a million customers in less than 2 years, despite the presence of long-time, established cellular carriers in each market, is perhaps the best empirical evidence that the CMRS market place is fully competitive. PBW is just one PCS carrier. The investment in PCS and other competitive systems, coupled with the success of these ventures, creates a thriving competitive arena that is not likely to be upended by the elimination of an outdated restriction.

As noted, the Commission is already charged with reviewing transfer applications, so any perceived increase in burden to the Commission due to elimination of the cap is illusory.[34] The Commission reviews transfers under the current rules, and would continue to do so if the cap was eliminated.

G. Cellular Cross-Interest Rule

The cross-interest rule[35] limits a carrier from owning interest in both the A and B bands of a given market. This rule, like the spectrum cap rule, was formulated during a time when

[34] Notice of Proposed Rulemaking, at p. 34, para. 77.
[35] 47 CFR § 22.942

the wireless market place was significantly more limited in scope than it is today. There was a defensible concern in the beginning that if there were no controls, the market could develop only one viable facilities-based carrier. As the Commission notes,[36] many wireless markets of today are composed of not only A and B cellular carriers, but multiple PCS carriers and a digital SMR system.

The cross-interest restriction is limited to cellular.[37] There is no similar rule pertaining to PCS or SMR. Thus, there is a pre-existing question of parity that can be resolved through the elimination of this rule. The Commission should not ignore the fact that the diversity of technologies (e.g., TDMA, CDMA, and GSM) create natural barriers to spectrum consolidation. Creating a geographic division where the rule is not enforced where PCS is operable (e.g., mainly urban areas), as the Commission suggests, but is enforced where PCS is not operable (e.g., mainly rural areas), would create yet another artificial barrier. This is especially true where there is vigorous competition from SMR and other wireless service providers. Additionally, the nationwide footprint being pursued by some carriers creates additional service options in many areas. Thus, the rule should be eliminated.

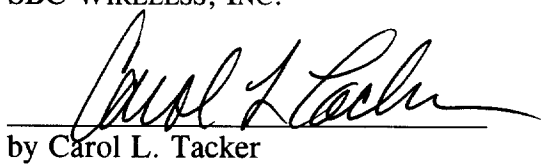
[36] Notice of Proposed Rulemaking, p. 36, para. 81.
[37] 47 CFR § 22.942.

V. Conclusion

SBCW supports the elimination of the spectrum cap and the cross-interest rule for the reasons set forth herein.

Respectfully submitted,

SBC WIRELESS, INC.



by Carol L. Tacker
Its Vice President & General Counsel
17330 Preston Road, Suite 100A
Dallas, TX 75252
phone: (972) 733-2005
fax: (972) 733-2021

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